JMJ FOOD & BEVERAGES SDN BHD v. MOHAMAD ZUKRILLAH ISMAIL & ORS

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
NALLINI PATHMANATHAN JCA
ZAMANI A RAHIM JCA
[CIVIL APPEAL NO: A-01(NCVC)(W)-518-12-2014]
11 JANUARY 2016

TORT: *Trespass – Damages – Appellant operating non-halal restaurant – Display of banner and brochures advertising about Ramadhan buffet – Whether halal status of restaurant questionable – Search and seizure – Enforcement officers seized banner and brochures from restaurant – Whether raid was in accordance with s. 40 Trade Descriptions Act 2011 – Whether appellant misled customers into believing that restaurant served halal food – Whether caused confusion among Muslims – Entire raid televised and screened nationwide – Whether respondents' actions mala fide – Whether appellant suffered damages*

The appellant was the owner of a restaurant known as the Tandoor Grill ('the restaurant'), a non-halal restaurant, primarily as it served alcoholic drinks as well. The ingredients used for cooking, however, were sourced from certified halal suppliers. The facts revealed that the appellant displayed a banner on the wall of the restaurant which stated that from 10 July 2013 to 7 August 2013, it would be serving Ramadhan buffet. Brochures to this effect were also printed and made available to customers. Based on a letter of complaint received by the Jabatan Agama Islam Perak ('JAIPk') in relation to the halal status of the restaurant, the first to the ninth respondents entered and conducted a raid in the restaurant on 24 July 2013 at about 11.30am. The inspection was conducted by three government agencies including the Ministry of Domestic Trade and Consumerism, JAIPk and the Department of Islamic Development Malaysia ('JAKIM'). In relation to this, brochures and the banner advertising about the Ramadhan buffet were seized from the restaurant. The respondents asserted that the restaurant ought not to have utilised the expressions 'Selamat Berbuka Puasa, Buffet Ramadhan 2013' since it did not possess a halal certificate and the expressions used were likely to mislead or confuse Muslims into thinking that the restaurant was somehow halal. The entire raid/operation was televised and screened nationwide based on the information provided by JAIPk in relation to the raid at the restaurant. The owner of the restaurant was investigated and subsequently prosecuted for an offence under the Trade Descriptions Act 2011 ('the Act'). As a result of the considerable damages suffered, the appellant initiated a suit in the High Court premised on trespass and/or *mala fide* abuse of power against the respondents and claimed for damages and an apology. JAIPk, however, was not named as one of the

A tortfeasor in the suit. The respondents named in this suit, however, argued that they conducted the raid based on the complaint received in relation to the halal status of the restaurant and the confusion caused to the public. The learned trial judge, however, dismissed the appellant's claim on the grounds, *inter alia,* that (i) the appellant did not show any act of restrain or protest B towards the respondents from conducting the inspection in the restaurant; and (ii) the respondents were authorised under s. 40 of the Act to enter and inspect the premises. Aggrieved, the appellant filed this appeal and the issues that arose for consideration were (a) whether the respondents had trespassed into the appellant's restaurant; and (b) whether the inspection was carried out *mala fide* where the respondent's entry and presence amounted to trespass. C

Held (dismissing appeal with costs)
Per Zamani A Rahim JCA (for the majority):

(1) There was no unjustifiable intrusion by the first to the ninth respondents as the latter entered the restaurant under the legal power conferred by D the Trade Descriptions Act 2011. As long as the inspection was based on valid grounds or on the exercise of a function under the Act, such process of inspection by the enforcement officers could not be reviewed or challenged by the appellant. Thus, the respondents could not be accused of committing trespass since the inspection was carried out in E accordance with the law. (paras 87, 89 & 91)

(2) The onus to prove *mala fide* was on the appellant. In order to succeed, the appellant had to show an improper or bad motive. A mere suspicion would not suffice. To prove *mala fide*, the appellant had questioned the issue of the necessity to carry out the inspection during the peak lunch F hour and the presence of the large number of media personnel during the inspection. However, these two factors alone were insufficient to constitute *mala fide*. Based on the facts and evidence, the respondents had good reasons to carry out the physical inspection. (paras 96, 100 & 103)

G **(3)** The words that were reflected in the banner and brochures must relate to halal cuisine or delicacies. By making such offer during the month of Ramadhan, the intended customers or patrons would be Muslims. The appellant, by way of necessary implication, representing that the restaurant was offering halal food, when in fact it was a certified non-halal outlet. The appellant's act in displaying the banner and H brochures so worded was an act that would likely confuse and mislead the Muslim customers. Therefore, there was a statutory duty on the part of the respondents to conduct further investigation as provided under the Trade Descriptions Act 2011. (para 107)

I **(4)** The first to the ninth respondents were not the persons who had contacted and invited the media/press to the restaurant. JAIPk had contacted the media and the said authority was not named as one of the tortfeasor in this action. An officer from JAIPk admitted that he had

informed the media about the impending raid to be carried out in the restaurant. However, the number of media personnel who attended were unexpected and beyond his control. The media was contacted for the purpose that the information be conveyed to the Muslim public for them to be cautious of the Ramadhan buffet offer as its halal status was questionable. The respondents or JAIPk did not intend to humiliate the appellant or to abuse their powers. Thus, the appellant failed to prove that the respondents acted *mala fide* when they carried out the inspection in the restaurant. (paras 113 - 116)

Per Nallini Pathmanathan JCA (dissenting):

(1) The respondents had no legal basis to conduct a search and seizure operation under the specific powers accorded to them *vide* s. 40 of the Act since the restaurant was expressly declared to be a non-halal certified restaurant. The section has no application to a restaurant declaring itself to be non-halal. The display of a banner and the brochures relating to the Ramadhan buffet in itself could not amount to false or misleading *indicia* of a certified halal status, in light of the express declaration by the restaurant that it was not certified as 'halal'. Further, the respondents were fully aware of the non-halal status of the restaurant when they undertook the search and seizure operation. As such, the acts of the respondents in entering and seizing products from a non-halal restaurant which they knew to be so certified amounted to a *mala fide* exercise of power. The learned judge failed to consider that such an establishment which expressly declared itself to be non-halal, could not then at the same time be said to mislead or confuse Muslims into believing that the restaurant was halal certified. (paras 34 - 36)

(2) Even if the respondents were clothed with authority to enter and search the premises, the manner and purpose for which the raid was undertaken was suggestive of *mala fides* in the mode of undertaking such an operation. The learned judge erred in failing to give any or adequate consideration to the salient facts. The error was compounded by his conclusion that their unauthorised acts, particularly the televising of the entire events was justified, or warranted, for the purposes of spreading awareness amongst Muslims when neither the Trade Descriptions Act 2011 nor its subsidiary legislation provides as such. (para 37)

(3) Where the respondents had in fact no authority to enter, search and seize documents *albeit* under s. 40 of the Act or otherwise, the respondents will then effectively have acted without authority and their entry, search and seizure will amount to trespass and arguably trespass *ab initio*. Even if it was argued that licence or permission was accorded to the respondents to enter the restaurant at the outset, this in itself did not exculpate the respondents' acts from amounting to trespass. On the facts, the respondents abused or failed to comply with the authority given to

A them by law by choosing to search and seize articles from a restaurant they knew to be non-halal and which therefore, did not fall within the purview of the Act or its subsidiary legislation relating to halal certification. As such, the conduct of the respondents, in nonetheless insisting upon a search and seize operation or raid, amounts to trespass
B *ab initio*. (paras 38, 39,40 & 43)

(4) The thrust of the legislation is to prosecute the providers of non-halal food or products who claim that their products are halal when in fact they are not. The restaurant, at all material times, expressly defined itself as non-halal and bore/carried no other marks or logos or insignia,
C which when looked upon by a Muslim would indicate definitely that the restaurant served only halal food. The fact that it described itself as non-halal negated any possibility of misleading others into thinking that it was halal. Further, the banner and brochures inviting customers to break their fast in the restaurant in the month of Ramadhan were not
D equivalent to logos or representations that the food served there was halal. (paras 49, 52 & 60)

(5) If goods or services are expressly stated to be non-halal, then they cannot at the same time cause confusion amongst Muslims on the grounds that they are labeled or held out as being halal. A Muslim who chooses to
E eat at the restaurant does so voluntarily, knowing that the restaurant is non-halal. It is pertinent in this context that halal certification in Malaysia is voluntary. As such, the restaurant, as an expressly certified non-halal restaurant could not therefore be said to be contravening the Act by misleading consumers as to the status of the food it serves.
F (paras 62, 64 & 66)

(6) The respondents were not empowered to enter into the premises of the restaurant and to undertake a search and seizure exercise under s. 40 since there was no basis for any conclusion on their part that an offence had been committed under the Act or its halal subsidiary legislation.
G Further, the respondents' right to enter and search the premises under the provisions of the Trade Descriptions Act 2011 was not a matter of fact, but one of law. Since the respondents' entry and seizure was not authorised under s. 40 of the Act, it would follow that their action in entering and seizing products from the premises of the restaurant
H amounted to trespass. In the circumstances, the raid or search was undertaken for a collateral or ulterior purpose. (paras 67, 68, 69 & 72)

(7) A non-halal restaurant is hardly likely to deceive or confuse simply because it invites the breaking of fast in its restaurant in the month of Ramadhan. In this context, it is significant that there were no halal logos
I or any such sign on either the brochures or the banner. There was simply no misleading information or insignia in the restaurant's advertisement that could reasonably be construed as amounting to a statement that the

restaurant was halal certified. In the absence of such an essential element of the offence, it could be concluded that the entry and seizure was unauthorised and therefore, unlawful. (para 73)

(8) The failure to comply with routine hygienic requirements when undertaking the inspection resulted in unnecessary loss and damage to the appellant. The appellant had to dispose of the products under health and safety laws and regulations. Further, the timing of the inspection exercise at a peak hour was yet another indication that the search was undertaken to cause maximum embarrassment, inconvenience and damage to the appellant. With the said intrusion comprising of not less than 30 to 35 persons, the impression given to the restaurant's customers would inevitably be some serious wrongdoing, when in point of fact there was no legal basis for the entire operation. The respondents' cumulative acts amounted to trespass and the appellant was entitled to be compensated for damages. (paras 74 & 76)

Bahasa Malaysia *Headnotes*

Perayu adalah pemilik sebuah restoran yang dikenali sebagai Tandoor Grill ('restoran'), sebuah restoran tidak halal, di mana minuman arak turut dijual di situ. Bahan-bahan yang digunakan untuk masakan, walau bagaimanapun, diperolehi daripada pembekal-pembekal halal yang diperakui. Fakta menunjukkan bahawa perayu mempamerkan iklan di dinding restoran menyatakan bahawa dari 10 Julai 2013 sehingga 7 Ogos 2013, restoran tersebut akan menghidangkan bufet Ramadhan. Risalah-risalah berkenaan iklan ini telah dicetak dan disediakan untuk pelanggan-pelanggannya. Berdasarkan surat aduan yang diterima oleh Jabatan Agama Islam Perak ('JAIPk') berkenaan status halal restoran tersebut, responden-responden pertama sehingga kesembilan memasuki dan melakukan serbuan di restoran tersebut pada 24 Julai kira-kira pada pukul 11.30 pagi. Pemeriksaan dilakukan oleh tiga agensi kerajaan termasuk Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan, JAIPk dan Jabatan Kemajuan Islam Malaysia (JAKIM). Berikutan itu, risalah-risalah dan iklan berkenaan bufet Ramadhan dirampas dari restoran tersebut. Responden-responden menghujahkan bahawa restoran tersebut tidak sepatutnya menggunakan ungkapan 'Selamat Berbuka Puasa, Buffet Ramadhan 2013' memandangkan ia tidak mempunyai sijil halal dan ungkapan yang digunakan mungkin akan mengelirukan para Muslim untuk mempercayai bahawa restoran tersebut adalah halal. Keseluruhan serbuan/operasi terhadap restoran tersebut disiarkan secara meluas berdasarkan maklumat yang diperolehi daripada JAIPk berkenaan serbuan di restoran tersebut. Pemilik restoran tersebut disoal siasat dan didakwa bagi kesalahan di bawah Akta Perihal Dagangan 2011 ('Akta'). Akibat kerugian yang dialami, perayu memfailkan tindakan di Mahkamah Tinggi berhubung dengan pencerobohan dan/atau penyalahgunaan kuasa secara *mala fide* terhadap responden-responden dan menuntut kerugian dan permohonan maaf. JAIPk, walau bagaimanapun,

A tidak dinamakan sebagai salah seorang pelaku tort dalam tindakan ini. Responden-responden yang dinamakan dalam tindakan ini pula menghujahkan bahawa mereka melakukan serbuan berdasarkan aduan yang diterima berkenaan status halal restoran tersebut dan kekeliruan yang disebabkan kepada orang awam. Yang Arif hakim bicara, walau
B bagaimanapun, menolak tuntutan perayu atas alasan, antara lain, bahawa (i) perayu tidak melarang responden-responden daripada melakukan pemeriksaan dalam restoran tersebut; dan (ii) responden-responden diberi kuasa di bawah s. 40 Akta untuk masuk dan membuat pemeriksaan di restoran tersebut. Tidak berpuas hati, perayu memfailkan rayuan ini dan isu-
C isu yang dibangkitkan untuk pertimbangan adalah (a) sama ada responden-responden telah mencerobohi restoran perayu; dan (b) sama ada pemeriksaan dilakukan secara *mala fide* di mana kemasukan dan kehadiran pihak responden terjumlah kepada satu pencerobohan.

Diputuskan (menolak rayuan dengan kos)

D **Oleh Zamani A Rahim HMR (keputusan majoriti):**

(1) Tiada pencerobohan tidak wajar dilakukan oleh responden-responden pertama sehingga kesembilan memandangkan pihak-pihak telah memasuki restoran tersebut di bawah kuasa undang-undang yang diberikan di bawah Akta Perihal Dagangan 2011. Selagi pemeriksaan
E dijalankan secara sah atau atas pelaksanaan tugasan di bawah Akta, proses pemeriksaan sebegitu oleh pegawai penguatkuasa tidak boleh disemak atau dicabar oleh perayu. Oleh itu, responden-responden tidak boleh dipertuduh melakukan pencerobohan memandangkan pemeriksaan yang dijalankan mematuhi peruntukan undang-undang.

F **(2)** Perayu mempunyai beban untuk membuktikan *mala fide*. Untuk berjaya, perayu perlu menunjukkan motif tidak wajar atau tidak baik. Keraguan semata-mata tidak mencukupi. Untuk membuktikan *mala fide*, perayu mempersoalkan isu berkenaan kehendak untuk menjalankan pemeriksaan sebegitu semasa waktu sibuk makan tengah hari dan
G bilangan kehadiran ahli media yang banyak semasa pemeriksaan. Walau bagaimanapun, kedua-dua faktor ini sahaja tidak mencukupi untuk membentuk *mala fide*. Berdasarkan fakta dan keterangan, responden-responden mempunyai alasan munasabah untuk menjalankan pemeriksaan fizikal tersebut.

H **(3)** Perkataan-perkataan yang dinyatakan dalam iklan dan risalah perlulah berkaitan dengan hidangan makanan halal. Dengan membuat tawaran sebegitu dalam bulan Ramadhan, pelanggan-pelanggan yang diniatkan adalah daripada golongan para Muslim. Perayu, melalui implikasi tertentu, menunjukkan bahawa restoran tersebut menawarkan makanan
I halal, padahal restoran tersebut diakui sebagai restoran tidak halal. Tindakan perayu mempamerkan iklan dan risalah-risalah tersebut mungkin mengelirukan pelanggan-pelanggan Muslim. Oleh itu,

responden-responden mempunyai tanggungjawab statutori untuk menjalankan pemeriksaan lanjut seperti diperuntukkan di bawah Akta Perihal Dagangan 2011.

(4) Responden-responden pertama sehingga kesembilan bukan pihak yang menghubungi media/penerbitan ke restoran tersebut. JAIPk yang menghubungi media dan badan tersebut tidak dinamakan sebagai salah satu pelaku tort dalam tindakan ini. Seorang pegawai dari JAIPk mengaku bahawa beliau telah memaklumkan pihak media berkenaan serbuan yang akan dijalankan di restoran tersebut. Walau bagaimanapun, bilangan pihak media yang hadir pada hari itu tidak disangka dan membatasi kawalannya. Pihak media dihubungi untuk menyebarkan maklumat kepada para Muslim supaya mereka sedar akan tawaran bufet Ramadhan memandangkan status halalnya dipersoalkan. Responden-responden atau JAIPk tidak berniat untuk memalukan perayu atau menyalahgunakan kuasa mereka. Oleh itu, perayu gagal untuk membuktikan bahawa responden-responden telah bertindak secara *mala fide* apabila mereka menjalankan pemeriksaan di restoran tersebut.

Oleh Nallini Pathmanathan HMR (menentang):

(1) Responden-responden tidak mempunyai alasan sah untuk mengadakan operasi mencari dan merampas di bawah kuasa spesifik yang diberikan kepada mereka melalui s. 40 Akta memandangkan restoran tersebut telah secara nyata diisytiharkan sebagai restoran tidak halal. Seksyen tersebut tidak boleh dipakai untuk sesebuah restoran yang diisytiharkan sebagai tidak halal. Pameran iklan dan risalah berkenaan bufet Ramadhan tidak dengan sendirinya membentuk petunjuk palsu atau kekeliruan berkenaan status halalnya, berdasarkan pengakuan nyata restoran tersebut bahawa ia tidak diperakui sebagai halal. Tambahan, responden-responden sedar akan status tidak halal restoran tersebut apabila menjalani operasi carian dan rampasan. Oleh itu, tindakan responden-responden memasuki dan merampas barangan daripada restoran yang diketahui tidak halal, adalah pelaksanaan kuasa secara *mala fide*. Yang Arif Hakim gagal mempertimbangkan badan sebegitu yang mengakui secara nyata sebagai tidak halal, tidak boleh pada masa yang sama dikatakan sebagai mengelirukan para Muslim untuk mempercayai bahawa restoran tersebut mempunyai sijil halal.

(2) Walaupun responden-responden mempunyai kuasa untuk memasuki dan mencari premis tersebut, cara dan tujuan serbuan tersebut dibuat mencadangkan unsur *mala fide* dalam cara pelaksanaan operasi tersebut. Yang Arif Hakim gagal memberi pertimbangan mencukupi terhadap fakta-fakta penting. Kekhilafan tersebut disokong oleh penemuan beliau bahawa tindakan tidak sah mereka, terutamanya dengan menyiarkan

segala kejadian adalah wajar atau adil, untuk menyebarkan kesedaran di kalangan para Muslim apabila Akta Perihal Dagangan 2011 atau perundangan subsidiarinya tidak memperuntukkan sedemikian.

(3) Apabila responden-responden tidak mempunyai kuasa untuk memasuki, mencari dan merampas dokumen-dokumen di bawah s. 40 Akta atau sebaliknya, pihak responden bertindak tanpa kuasa dan kemasukan, carian dan rampasan tersebut membentuk pencerobohan *ab initio*. Walaupun dihujahkan bahawa lesen atau kebenaran diberikan kepada responden-responden untuk memasuki restoran tersebut, perkara ini dengan sendirinya tidak mengecualikan tindakan responden-responden daripada menjadi pencerobohan. Berdasarkan fakta, responden-responden menyalahgunakan atau gagal mematuhi kuasa yang diberikan kepada mereka dengan memilih untuk mencari dan merampas barang-barang dari restoran tersebut, walaupun mereka mengetahui bahawa restoran tersebut tidak halal, dan oleh itu, tidak terangkum di bawah Akta atau undang-undang subsidari berkenaan sijil perakuan halal. Oleh itu, tindakan responden-responden, dengan memaksa suatu operasi carian dan rampasan atau serbuan dijalankan membentuk pencerobohan *ab initio*.

(4) Asas perundangan adalah untuk memberi hukuman kepada pembekal makanan tidak halal atau produk-produk yang dikatakan sebagai halal apabila pada hakikatnya, tidak halal. Dalam kes ini, restoran tersebut, pada setiap masa mengakui secara nyata sebagai tidak halal dan tidak mempamerkan logo atau tanda, yang apabila dilihat oleh seorang Muslim, menunjukkan bahawa restoran tersebut hanya menjual makanan halal. Fakta bahawa ia mengakui sebagai tidak halal mengetepikan sebarang anggapan yang mengelirukan orang lain untuk mempercayainya sebagai halal. Tambahan, iklan dan risalah yang menjemput pelanggan-pelanggannya berbuka puasa di restoran tersebut pada bulan Ramadhan tidak sama seperti logo atau representasi yang dibuat bahawa makanan yang disediakan adalah halal.

(5) Jika barangan dan perkhidmatan dinyatakan sebagai tidak halal, ia tidak boleh, pada masa yang sama, menyebabkan kekeliruan kepada para Muslim atas alasan bahawa barangan tersebut dinyatakan sebagai halal. Seorang Muslim bertindak secara sukarela jika dia memilih untuk makan di restoran tersebut, dengan pengetahuan bahawa restoran tersebut tidak halal. Adalah penting dalam konteks ini bahawa perakuan sijil halal di Malaysia adalah secara sukarela. Oleh itu, restoran tersebut, sebagai sebuah restoran yang dengan jelas dikatakan sebagai sebuah restoran tidak halal tidak boleh kemudian dikatakan bercanggah dengan Akta dengan mengelirukan pengguna-pengguna berkenaan status makanan yang dihidang.

(6) Responden-responden tidak diberi kuasa untuk memasuki premis tersebut dan membuat carian dan rampasan di bawah s. 40 Akta memandangkan tiada asas untuk membuat kesimpulan bahawa suatu kesalahan telah dilakukan di bawah Akta atau undang-undang subsidiari. Tambahan, hak pihak responden untuk memasuki dan menyerbu premis tersebut di bawah peruntukan Akta Perihal Dagangan 2011 bukanlah satu perkara fakta, tetapi undang-undang. Memandangkan kemasukan dan rampasan responden-responden tidak dilakukan secara sah di bawah s. 40, maka, tindakan mereka memasuki dan merampas produk-produk daripada permis restoran terjumlah kepada pencerobohan. Dalam keadaan ini, serbuan dan carian yang dilakukan dibuat untuk tujuan kolateral atau tersembunyi.

(7) Sebuah restoran tidak halal jarang menyebabkan kekeliruan hanya kerana jemputan berbuka puasa di restoran tersebut pada bulan Ramadhan. Di dalam konteks ini, adalah penting bahawa tiada logo halal atau tanda sebegitu sama ada dalam risalah atau iklan. Tiada maklumat palsu atau petunjuk dalam iklan restoran tersebut yang boleh dikatakan terjumlah kepada kenyataan bahawa restoran tersebut mempunyai sijil perakuan halal. Dalam ketiadaan unsur penting kesalahan, kemasukan dan rampasan yang dibuat tidak dibenarkan dan oleh itu, tidak sah.

(8) Kegagalan mematuhi peraturan kebersihan apabila menjalani pemeriksaan tersebut telah menyebabkan kehilangan dan kerugian kepada perayu. Mengikut undang-undang dan peraturan-peraturan kesihatan dan keselamatan, perayu terpaksa membuang produk-produknya. Tambahan, pemeriksaan dilakukan pada waktu sibuk yang menunjukkan bahawa serbuan tersebut memalukan, mengakibatkan ketidakselesaan dan kerugian kepada perayu. Dengan kehadiran yang merangkumi tidak kurang daripada 30 sehingga 35 orang, adalah tanggapan yang wujud pada pelanggan restoran bahawa kesalahan serius berlaku, apabila operasi sebegitu dari segi undang-undang tidak sepatutnya dibuat. Tindakan responden-responden, secara kumulatif, menunjukkan bahawa berlaku pencerobohan dan perayu layak menerima pampasan bagi kerugian yang dialami.

Case(s) referred to:

Ahmad Azam Mohamad Salleh & Ors v. Jabatan Pembangunan Koperasi Malaysia & Ors [2004] 4 MLJ 86 ***(refd)***

Anne Lim Keng See v. The New Straits Times Press (M) & Anor And Other Appeals [2008] 6 CLJ 697 CA ***(refd)***

Azizah Zainal Abidin & Ors v. Dato Bandar Kuala Lumpur [1999] 5 CLJ 565 HC ***(refd)***

Cinnamond v. British Airports Authority [1980] 1 WLR 582 ***(refd)***

Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor [2010] 9 CLJ 46 HC ***(refd)***

A *Hillen and Pettigrew v. ICI (Alkali) Ltd [1936] AC 65* ***(refd)***
Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister Of Home Affairs), Malaysia [1969] 1 LNS 65 FC ***(refd)***
Kerajaan Malaysia & Ors v. Tay Chai Huat [2011] 1 CLJ 592 CA ***(refd)***
Oakfield Enterprises Sdn Bhd v. Tenaga Nasional Bhd [1998] 1 LNS 430 HC ***(refd)***
One Visa Sdn Bhd v. Telekom Malaysia Bhd [2015] 10 CLJ 569 HC ***(refd)***
B *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC* ***(refd)***
Six Carpenter's Case (1610) 8 Co Rep 146a ***(refd)***

Legislation referred to:
Trade Descriptions (Definition of Halal) Order 2011, O. 1, O. 4(1), O. 5(b)
C Trade Descriptions Act 2011, s. 40(1)(a), (b), (c), (d)

Other source(s) referred to:
Basu's Commentary on the Constitution of India, 5th edn, vol 2, p 153
MP Jain, *Administrative Law of Malaysia and Singapore*, 4th edn, pp 411, 412, 413
Winfield & Jalowicz on Tort, 13th edn, p 573

D *For the appellant - KB Tan (Raam Kumar with him); M/s KB Tan Kumar & Partners*
For the respondents - Zureen Elina Mohd Dom; SFC

[Editor's note: For the High Court judgment, please see JMJ Food & Beverages Sdn Bhd lwn. Mohamad Zukrillah Ismail & Yang Lain [2015] 3 CLJ 254 (affirmed).]

E *Reported by Kumitha Abd Majid*

JUDGMENT

Nallini Pathmanathan JCA (Dissenting):

F **Introduction**

[1] JMJ Food & Beverages Sdn Bhd ('the appellant') is the owner of a restaurant known as the 'Tandoor Grill' ('the restaurant'). The restaurant is styled as a 'fine dining' Indian restaurant and claims to enjoy a favourable reputation. The restaurant is not and was never registered as a 'halal' G restaurant with the relevant authorities, primarily because the restaurant has a bar, which serves alcoholic drinks. The ingredients used for cooking in the restaurant however, are sourced from certified halal suppliers. The owner of the restaurant did not at any time hold it out as being a 'halal' certified restaurant. Notwithstanding its non-halal status, both non-Muslims and H Muslims patronised the restaurant, as is the case with many other dining establishments, clubs and hotels throughout Malaysia.

[2] In July 2013, the appellant displayed a banner on the wall of the restaurant, which stated that for the period from 10 July 2013 to 7 August 2013, it would be serving a Ramadhan buffet. Brochures to this effect were I also printed and made available to customers. These advertisements, as they expressly stated, were invitations to enjoy a buffet at the restaurant during the month of Ramadhan. It bears repetition that the restaurant at no time

utilised any logos or certification suggesting it was 'halal' certified. On the contrary, the restaurant was declared to be 'non-halal'. This fact could be readily ascertained by a search conducted online.

[3] On 24 July 2013 at about 11.30am, a group of officers and employees totaling some 35 persons from the Ministry of Domestic Trade and Consumerism, JAIPk and JAKIM conducted a raid on the restaurant during its peak lunch time hour. Some of them are named as parties to this suit ('the respondents'). Despite knowing that the restaurant was not a 'halal' certified restaurant and did not hold itself out as such, the respondents gained entry into the restaurant to conduct the raid. Some of the respondents in the course of their testimony confirmed that they were aware at the time of undertaking the raid that the restaurant was not a 'halal' restaurant as confirmed by their online search.

[4] The respondents seized the brochures and the banner advertising the 'Ramadhan buffet' from the restaurant. In so far as the respondents were concerned, the restaurant ought not to have utilised expressions like 'Selamat Berbuka Puasa, Buffet Ramadhan 2013' simply by reason that it did not possess a 'halal certificate'. The respondents maintained that the use of these expressions were likely to 'mislead' or 'confuse' Muslims into thinking that the restaurant was somehow 'halal'. The respondents so maintained, notwithstanding that the restaurant has never held itself out as 'halal' certified.

[5] The entire raid/operation was televised and screened nationwide as the raiding officers (from JAIPk) had tipped off the press about the raid at the restaurant.

[6] The raid and televising of that event nationwide caused the restaurant to suffer considerable damage. Accordingly the appellant initiated this suit premised on trespass and or *mala fide* abuse of power against the respondents, claiming damages and an apology. In the High Court, the learned Judicial Commissioner confined his judgment to that of liability alone. The appellant's claim against the respondents was dismissed with costs at the end of the trial.

[7] It is against the decision on liability that this present appeal is founded. In the court below there was essentially one issue for determination by the court, namely:

> Whether there was a *mala fide* exercise of power by the Respondents when they raided the restaurant on 24 July 2013 and seized the brochures and the banner on the grounds that the restaurant did not have a halal certificate? If there was *mala fides*, did this render the presence of the Respondents in the restaurant a trespass in all the circumstances of the case?

[8] In order to ascertain the foregoing, it is necessary to comprehend the legislation pursuant to which the respondents purported to exercise their powers of search and inspection and forfeiture. If the respondents exercised their powers within the letter and spirit of the relevant legislation enabling them to carry out their duties and functions, the issues of trespass and *mala fides* do not arise. If, on the other hand, there was no legitimate basis for the exercise of this power and search under the legislation empowering the respondents in the course of their duties, and/or the exercise of such power was arbitrary, *mala fides* or exercised for some collateral or ulterior motive, then the respondents may well be said to have committed trespass.

[9] Prior to considering the legislation however, the salient facts of the case warrant consideration.

The Parties

[10] The appellant has been identified above. The identities of the respondents are as follows:

(i) the first respondent is a Deputy Director of the Halal Hub Division as well as an employee and agent of the tenth defendant, namely Jabatan Kemajuan Islam Malaysia (ie, JAKIM);

(ii) the second to fourth defendants are employees, agents and officers of the tenth defendant, JAKIM;

(iii) the fifth defendant is an assistant enforcement officer as well as an employee and agent of the 13th defendant, the Ministry of Domestic Trade, Co-operatives and Consumerism Perak (KPDNKK Perak), a branch of the 11th defendant operating in Perak;

(iv) the sixth to ninth defendants are employees, agents and officers of the 13th defendant;

(v) the tenth defendant, the Department of Islamic Development Malaysia (JAKIM), is a government agency which is tasked with the responsibility to, among others, administer Islamic religious affairs in Malaysia;

(vi) the 11th defendant, the Ministry of Domestic Trade, Cooperative and Consumerism (KPDNKK), is a Government Ministry tasked with the responsibility to, among others, encourage the growth of domestic trade as well as increase the effectiveness of consumer protection;

(vii) the 12th defendant is the Government of Malaysia;

(viii) the 13th defendant, the Ministry of Domestic Trade, Co-operatives and Consumerism Perak (KPDNKK Perak), is a branch of the 11th defendant operating in Perak;

(ix) the 14th defendant is the Chief Director of JAKIM;

(x) The 15th defendant is the Minister of the Ministry of Domestic Trade, Cooperative and Consumerism; and

(xi) the 16th defendant is the Director of the Ipoh branch of the Ministry of Domestic Trade, Co-operatives and Consumerism Perak (KPDNKK) Perak.

The Salient Background Events

[11] In July 2013, the plaintiff hung a banner on the wall of the Tandoor Grill stating that from 10 July 2013 to 7 August 2013, it would be serving a 'Ramadhan buffet'. The plaintiff also printed brochures advertising its 'Ramadhan buffet'. These advertisements were printed in Malay and English and contained phrases as set out below:

"Selamat Berbuka Puasa"; "Ramadhan Buffet" and "Have your Buka Puasa Gatherings at Tandoor Grill".

[12] On 19 July 2013, the Perak Islamic Religious Department (JAIPk) received an anonymous letter dated 16 July 2013 purporting to be from a Muslim individual complaining about the said 'Ramadhan buffet' promotion. The letter alleged that the complainant had visited the Tandoor Grill but saw bottles of alcoholic beverages openly displayed, and the owner of the Tandoor Grill acted in an arrogant manner towards the complainant upon being queried as to this issue.

[13] Acting upon this anonymous complaint, between 11.30am to 11.45am on 24 July 2013, the first to ninth respondents conducted an inspection and seizure operation on the Tandoor Grill. It was a joint operation conducted by three agencies, ie, the tenth and 11th defendants, KPDNKK and JAKIM, as well as JAIPk. The operation team comprised 30 - 35 enforcement officers.

[14] At the premises of the Tandoor Grill, this team of 30 - 35 enforcement officers together with members of the press, were met by one Jaswerenjit Kaur a/p Jagjit Singh, a director of the appellant (SP1). One of the officers from KPDNKK told her that he wanted to investigate the restaurant on the basis the restaurant was serving non-halal food. SP1 told him that the restaurant was a non-halal entity and had never advertised itself as a 'halal' entity. However, the team insisted on proceeding with the inspection.

[15] Since SP1 could not stop them from entering the restaurant, she escorted them around the restaurant as they conducted their inspection. She also called her father, Jagjit Singh a/l Sucha Singh, another director of the plaintiff (SP3) to come to the restaurant and he did so. When he arrived around 12pm, the operation team was spread throughout the restaurant

A conducting their raid and inspection. SP3 was informed that there was a complaint against his restaurant but he was not shown the complaint letter. He asserted that the restaurant was not halal-certified so naturally the operation team would find non-halal substances in the restaurant. However, the operation team proceeded with their inspection. SP3 disputed the right
B of the media to be present in the restaurant but the operation team said that the media had to be present with them.

[16] During the course of the inspection, the appellant's witnesses demonstrated that their food sources were from 'halal' suppliers. SP3's children showed the 'halal' certificates from the food suppliers to the
C operation team.

[17] JAIPk had also called members of the media to be present during the inspection at Tandoor Grill. The press reporters followed the operation team around the restaurant during their inspection. The operation team opened every refrigerator and cabinet and even entered the freezer room where fresh
D meat was stored. In so doing they failed to comply with requisite mandatory hygienic practices and did not wear gloves or proper footware.

[18] The operation team "discovered" alcohol in the mini bar and in the kitchen fridge. It bears repeating that the Tandoor Grill had specifically not sought to register itself as being 'halal' certified, notwithstanding its sourcing
E of its food materials solely from 'halal' sources precisely because it expressly declared that alcohol was served on its premises.

[19] Finally, members of the KPDNKK Perak seized the banner and 101 brochures.

F **[20]** The inspection ended around 12.45pm. Before leaving, the operation team issued the plaintiff with an inspection statement, a seizure acknowledgement receipt, and a Malaysia halal certification monitoring notice.

G **[21]** As a consequence of this chronology of events, the appellant filed this suit against the respondents claiming that they had, with *mala fides*, committed a trespass, which caused the appellant damage and loss, as well as causing it to suffer a loss of reputation. The appellant claimed RM2 million general damages, RM2 million exemplary damages, a public apology, interests and costs.

H **[22]** Well after the institution of the suit by the appellant, the respondents initiated a criminal complaint against the appellant under the provisions of the Trade Descriptions Act 2011. They had not chosen to do so immediately after the seizure of the banner and the brochures, but only after this suit was
I initiated. The criminal case is pending.

[23] This comprises a summary of the salient factual background. A

The Decision Of The High Court

[24] The learned High Court Judge in his judgment exculpated the respondents from liability essentially on the following grounds:

(i) the first question for determination was whether the conduct of the defendants in entering the premises of Tandoor Grill despite attempts to stop them from doing so, or the conduct of the defendants once within the premises of Tandoor Grill, amounted to an act of trespass? In deciding this question, the court considered the purpose of the defendants entering the premises of Tandoor Grill; B C

(ii) the court concluded that the respondents were authorised under s. 40 of the Trade Descriptions Act (TDA) 2011 to enter and inspect premises. Besides that, the CCTV recordings support the defendants' evidence that they were allowed to enter the premises. Therefore, the court held that the operation did not amount to trespass; D

(iii) with respect to the issue of *mala fides* raised by the appellant the High Court held that the burden lay on the appellant to prove its allegation of *mala fide* on the part of the first to ninth defendants. The court found that the actions of the first to ninth defendants were done in furtherance of their purpose to check on non-halal certified premises, which offered 'Ramadhan buffets'. A physical investigation had to be undertaken because an online search would not disclose whether there was in fact compliance with the law; E

(iv) the High Court considered that matters relating to halal food are sensitive issues for the Muslim community. The court elucidated upon the issue at hand thus: A 'Ramadhan buffet' is targeted at Muslims because Islam is the only religion which has followers fasting during the month of Ramadhan. The banner displayed by the Tandoor Grill was tantamount to inviting Muslims to dine at that restaurant. The same applies to the brochures. A non-halal certified restaurant is forbidden from doing this and therefore the defendants were justified in conducting investigations at Tandoor Grill; F G

(v) the High Court found that the actions of JAIPk in inviting the media to cover the investigations at Tandoor Grill were unjustified. However, the court found that there was no *mala fides* on JAIPk's part because their intention was not to humiliate the plaintiff but only to spread awareness among the Muslim community that they should be wary of Ramadhan promotions by restaurants with dubious 'halal' status; H

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(vi) the High Court concluded that the first to ninth defendants did not exceed the powers granted to them; and

(vii) on the issue of the anonymity of the complaint and the absence of an identified complainant, the High Court concluded that there was no law stating that JAIPk, KPDNKK Perak or JAKIM could not act on anonymous complaints but only on complaints with the name, address and IC number of the complainant.

[25] As such, the court concluded that the appellant had failed to prove its case and dismissed the claim under the tort of trespass with costs.

The Appellant's Submissions On Appeal

[26] The appellant's submissions on appeal may be summarised thus:

The appellant maintained that the respondents exhibited *mala fides* in the conduct of the search and seizure operation on 24 July 2013. This was because:

(i) the respondents planned their search to take place during the peak period at the restaurant namely when lunch was being prepared and preparations were being undertaken to serve lunch customers;

(ii) the respondents insisted on raiding the restaurant despite being informed by the plaintiff's employee that Tandoor Grill was not a 'halal' restaurant;

(iii) despite the appellant trying to stop the press, media and television camera crew from entering the restaurant, the respondents warned the appellant's employee that the reporters and camera crew must be allowed to enter together with the defendants. Their intrusion lasted about one hour;

(iv) the appellant's witnesses testified that the operation team unlawfully and without reason crowded into the dining hall, the serving hall, the kitchen, and the freezer room. The appellant complained that the respondents entered the freezer room which is used to store meat without wearing proper shoes, touched the stored food without wearing gloves, and displayed the food to the media representatives;

(v) the appellant claimed it suffered losses when its customers cancelled reservations with Tandoor Grill and it had to dispose of the food stored in the freezer room on health and safety grounds. Worse, the appellant lost the reputation which it had built up;

(vi) In explaining that the exhibition of the banner and brochures in no manner detracted from its declaration that it was a non-halal certified restaurant the appellant pointed to the following salient factors:

(a) The plaintiff obtained a licence from the Ipoh Town Council to display the banner. The words in the banner were referred to and approved by the Ipoh Town Council;

(b) The banner and the brochures did not bear the 'halal' logo;

(c) The 'Ramadhan buffet' had a condition of two days advance reservation, therefore customers would know the menu in advance;

(d) There was no 'halal' logo or sign in any part of Tandoor Grill;

(e) The Tandoor Grill was not registered nor advertised as a 'halal' restaurant;

(f) The appellant's employee had told the first to ninth respondents that the Tandoor Grill was not a 'halal' restaurant before they entered the premises;

(g) Since the Tandoor Grill is not a 'halal' restaurant, it is unsurprising for alcoholic beverages to be found in the premises;

(h) No witnesses were called by the defendants to testify that the words in the banner and brochures were capable of misleading and confusing Muslims; and

(i) The media were asked to capture the raid on film and it was later shown on the national news.

[27] As such, the appellant submitted that the respondents' conduct in both entering and conducting the exercise were illegal. Further the mode of undertaking the search and seizure exercise was tainted with *mala fides*.

[28] The appellant maintained that the learned High Court Judge had failed to appreciate both the law and the circumstances in relation to the search and seizure exercise wrongfully conducted by the respondents and urged this court to allow its appeal.

The Respondents' Submissions

[29] By way of reply, the respondents maintained that there was never any question of trespass on their part because they were duly authorised and empowered under the law to enter the premises of the restaurant to conduct their investigation.

[30] They submitted that they had 'gone the extra mile' by asking the appellant's employees for permission to enter when there was no necessity to do so. The respondents further denied any *mala fides* on their part because they had good reasons to carry out the physical inspection of the premises based on a complaint.

[31] In so far as the presence of the press was concerned, the respondents pointed out that it was JAIPk who invited the members of the press to be present during the investigation, so even if there was *mala fides* it would be on the part of JAIPk, and not the first to ninth respondents. However JAIPk was not named as the tortfeasor. In any case the respondents say that there is no *mala fides* in inviting the media because the purpose was to spread awareness among Muslims.

[32] In summary the respondents maintained that the acts were fully authorised under the law and they could not be faulted either for having conducted the search and seizure operation, or for the manner in which they did so. The allegation of trespass and consequent claim for damages had been rightfully dismissed by the learned High Court Judge.

The Decision Of The Court Of Appeal

[33] After hearing submissions and perusing the appeal record the Court of Appeal determined by a majority that the decision of the High Court be affirmed. I dissented from the majority view for reasons which are fully explained below.

Mala Fides Exercise of Power

[34] In essence, I concluded that the respondents had no legal basis to conduct a search and seizure operation under the specific powers accorded to them under s. 40 of the TDA 2011. This is primarily because the Tandoor Grill is expressly declared to be a non-halal certified restaurant. The display of a banner and the brochures relating to the 'Ramadhan buffet' in themselves could not amount to 'false' or misleading *indicia* of a certified 'halal' status, in light of the express declaration by the restaurant that it was not certified as 'halal'. This was repeated to the respondents at the point at which they chose to exercise their powers under s. 40. There was also evidence that the respondents were fully aware of the non-halal status of the restaurant when they undertook the search and seizure operation.

[35] Given these facts, as explained below, the acts of the respondents in entering and seizing products from a non-halal restaurant which they knew to be so certified, amounted to a *mala fide* exercise of power (see *Karam Singh v. Menteri Hal Ehwal dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129). In his renowned text on *Administrative Law of Malaysia and Singapore* (4th edn at pp. 411 - 412), MP Jain explains *mala fides* thus:

> *Mala fides* or bad faith on the part of the decision-maker vitiates a decision even though the authority acts within the legal limits of its powers. The expression *mala fides* is used here in a narrow sense implying dishonest intention or corrupt motive or personal animosity or vendetta on the part of the authority ... *At times, the term mala fides may be used in a sense wider*

than corrupt motive. In this sense, mala fides may denote all those grounds which indicate abuse of power, e.g. irrelevant considerations, improper purpose etc. In this way, mala fides becomes a synonym for abuse of powers. (emphasis added)

[36] Here, the respondents by embarking and undertaking the raid on a restaurant which proclaimed itself to be non-halal, were effectively exercising powers which they did not possess, as s. 40 permits such search and seizure operation within the circumscribed limits of the section. The section has no application to a restaurant declaring itself to be non-halal. As such, the acts of the respondents fall within the definition of *mala fides* as specified above. The learned Judicial Commissioner therefore erred in concluding that the respondents were fully authorised to undertake the search and seizure operation under s. 40 of the TDA 2011. In so concluding the learned judge failed to consider whether the search and seizure operation specifically circumscribed under s. 40 were in fact applicable to a restaurant which expressly declared itself to be 'non-halal'. He also failed to consider that such an establishment which expressly declared itself to be non-halal, could not then at the same time be said to 'mislead' or 'confuse' Muslims into believing that the restaurant was 'halal' certified.

Mala Fides In The Exercise Of Power

[37] Even if the respondents were clothed with authority to enter and search the premises, the manner and purpose for which the raid was undertaken is suggestive of *mala fides* in the mode of undertaking such an operation. The manner in which the operation was undertaken, namely:

(a) the calling of the press to ensure that the entire proceedings would be televised nationwide;

(b) the failure to comply with routine hygienic requirements when undertaking the inspection;

(c) the timing of the inspection exercise at a peak hour;

(d) the insistence on proceeding with the inspection despite knowing that the restaurant represented itself to the world at large as being non-halal and therefore could not confuse customers into believing that it was 'halal'; and

(e) acting on an anonymous complaint that erroneously suggested that the Tandoor Grill was 'halal' when the respondents knew from an online check that it was not so 'halal' certified.

All point towards a clear *mala fides* or corrupt motive or personal animosity on the part of the respondents in the conduct of the "operation" on 24 July 2013. The learned judge erred in failing to give any or any adequate consideration to these salient facts. This error was compounded by his conclusion that their unauthorised acts, particularly the televising of the

entire events was justified, or warranted, for the purposes of 'spreading awareness' amongst Muslims, when neither the Trade Descriptions Act 2011 nor its subsidiary legislation provides as such.

Trespass

[38] As for trespass, so long as the respondents are authorised to carry out the raid or operation under the purview of the law, ie, s. 40, the allegation of trespass is not made out. Conversely however, where the respondents have in fact no authority to enter, search and seize documents *albeit* under s. 40 or otherwise, the respondents will then effectively have acted without authority and their entry, search and seizure will amount to trespass, and arguably trespass *ab initio*.

[39] Even if it is argued that licence or permission was accorded to the respondents to enter by the appellant's employee at the outset, this in itself does not exculpate the act/s of the respondents from amounting to trespass. Authority for this proposition goes back to the common law and the *Six Carpenter's Case* (1610) 8 Co Rep. 146a; 1 Smith L.C. 134. I reproduce a summary of that case by Lord Denning in *Cinnamond v. British Airports Authority* [1980] 1 WLR 582 at p. 588:

> … In that case six carpenters went into a wine tavern in the City of London called the Queen's Head. They had a right by law to enter into it, it being a common tavern. When they got in there, they ordered a quart of wine and a penny-worth of bread amounting to 8d. They refused to pay and would not pay. The inference was that from the beginning they went in with the intention of having the wine and the bread and not paying for it. The court held that they were guilty of a trespass from the beginning. It was resolved said Lord Coke at page 135 that "when entry, authority, or licence is given to anyone by the law, and he abuses it, he shall be a trespasser *ab initio*" - from the beginning.

[40] So is it the case here. The respondents 'abused' or failed to comply with the authority given to them by the law by choosing to search and seize articles from a restaurant they knew to be non-halal and which therefore did not fall within the purview of the Trade Descriptions Act 2011 or its subsidiary legislation relating to halal certification. As such, the respondents became trespassers from the beginning.

[41] This line of reasoning on trespass and trespass *ab initio* is borne out by *Cinnamond and Other v. British Airports Authority* (above) where it was held that car-hire drivers who ferried passengers to and from an airport were held to be trespassers *ab initio* when they abused the authority accorded to them by specific by-laws allowing entry to the airport, by hanging about and 'touting'. It was held that they became trespassers from the beginning and could be turned out as they were abusing the authority given by the law.

[42] And in *Hillen and Pettigrew v. ICI (Alkali) Ltd* [1936] AC 65 the appellants were members of a stevedore's gang employed to load a steamship from the respondents' barge, Hibernia. The cargo in question consisted of bicarbonate of soda in bags. In the course of loading the cargo, the appellants utilised an improper method of loading involving hatch covers. As a consequence the hatch covers gave way and appellants fell into the hole and were injured. The appellants knew that it was dangerous and improper to load cargo off the hatch covers. Nonetheless the appellants sought compensation. However their claims were rejected, *inter alia*, on the grounds that they were trespassers. The appellant stevedores knew that they ought not to use the covered hatch in order to load cargo from it; for them for such a purpose it was out of bounds. The defendants had no reason to contemplate such a use.

[43] In like manner in the instant case, the respondents knew or ought to have known that the Tandoor Grill, bearing a non-halal status, could not be said to be masquerading as a 'halal' certified restaurant for the purposes of the respondents exercising their powers under s. 40 of the TDA 2011. The fact that they knew it described itself as non-halal is evident from the testimony of more than one witness. As such the conduct of the respondents, in nonetheless insisting upon a search and seize operation or raid, amounts to trespass *ab initio*.

[44] The learned judge failed to consider adequately or at all whether there was any factual or legal basis warranting the respondents' exercise of their powers under s. 40 of the TDA 2011 and its subsidiary legislation relating to halal certification and enforcement. As a result, he erred in law in concluding that there was no trespass or *mala fides* abuse of power by the respondents in undertaking the search and seize operation or raid on 23 July 2013. If he had addressed his mind to this issue in the context of the proper purpose and objective of the legislation, he would have reached a different conclusion. At this juncture it would be apposite to consider the legislation relating to 'halal' certification and enforcement under the Trade Descriptions Act 2011.

Relevant Legislation Relating To 'Halal' Certification And Enforcement - The Trade Descriptions Act 2011

[45] The main provisions on 'halal' food and products, are principally found in regulations made under the general provisions of the Trade Descriptions Act 2011. Its predecessor was the Trade Descriptions Act 1972. The Trade Description Act regulates 'halal' affairs in Malaysia. Using the general provision of trade descriptions, any non-halal food or products claimed as 'halal' will be regarded as violating the Act because it signifies a false trade description, namely falsely identifying a food product or service

as 'halal' when it fact it is non-halal. The 2011 Act aims to promote good trade practices by prohibiting false trade practices in relation to the supply of goods and services. Its stated objective is as follows:

> An Act for the purpose of promoting good trade practices by prohibiting false trade descriptions and false or misleading statements, conduct and practices in relation to the supply of goods and services and to provide for matters connected therewith or incidental thereto.

[46] In relation to 'halal' certification, the Trade Descriptions Act 2011 introduced the Trade Descriptions (Definition of Halal) Order 2011 and the Trade Descriptions (Certification and Marking of Halal) Order 2011 giving specific legal provisions on matters relating to halal certification.

[47] The Trade Descriptions (Definition of Halal) Order 2011 provides that when food or goods are described as 'halal' or are described in other expression to indicate that the food can be consumed or used by Muslim people, such expression means that the food or goods has followed the requirements that has been imposed by Islamic law on foods and goods. The definition of 'halal' is fully set out in O. 1. In effect, the regulation provides that any food or goods described as 'halal' or described in any other expression to indicate that it can be consumed by a Muslim means that the food or goods in question must conform to the "Hukum Syarak".

[48] Order 4 of the Trade Descriptions (Definition of Halal) Order 2011 makes it an offence for any person to supply food through any representation or act which is likely to mislead or confuse any person that the food they offer is 'halal' or can be consumed by a Muslim.

[49] It is clear from the foregoing that the thrust of the legislation is to prosecute the providers of non-halal food or products who claim that their products are 'halal' when in fact they are not. Such false representation may be effected by the use of false logos or any other representations indicating that the food they provide is 'halal'. In other words, traders or manufacturers who utilise the 'halal' mark or any other representations falsely, seeking to indicate that the food and services they provide are 'halal' contravene the Act as well as the subsidiary legislation made thereunder.

[50] In relation to the certification and marking of food or goods which are 'halal', the Trade Descriptions (Certification and Marking of Halal) Order 2011 was promulgated with effect from 1 January 2012 to regulate and certify the process by which any food, goods or services may be certified as 'halal' in accordance with the Trade Descriptions (Definition of Halal) Order 2011.

[51] It is apparent from the history of this legislation commencing with the Trade Descriptions Act 1972, now replaced by the Trade Descriptions Act 2011 and its ancillary regulations, that the statute was enacted to prevent

manufacturers, retailers and service providers from manipulating and confusing consumers with false trade descriptions and misleading conduct in the supply of goods and services. With respect to 'halal' certification in particular, it is aimed at punishing offenders who falsely represent that their goods and services are 'halal', *albeit* with the use of a false logo or words to that effect, when in point of fact they are not.

[52] In the instant case, the Tandoor Grill, owned by the appellant, at all material times expressly defined itself as non-halal and bore/carried no other marks or logos or insignia, which when looked upon by a Muslim, would indicate definitively that the restaurant served only 'halal' food. The banner and brochures inviting customers to break fast in the restaurant in the month of Ramadhan are not equivalent to logos or representations that the food served there is 'halal', more particularly when the restaurant expressly describes itself as 'non-halal'.

[53] If a restaurant is described as 'non-halal' voluntarily, as is the case with the Tandoor Grill, can it reasonably be concluded that by displaying approved banner inviting customers to break their Ramadhan fast there, that the restaurant is falsely representing itself to be 'halal' certified, or is trying to confuse or mislead its customers into thinking that it is?

[54] In answering this question, considerable weight must be accorded to the fact that an essential element of an offence under the Trade Descriptions Act 2011 is missing, namely the element of trying to deceive or mislead the customers into thinking that the restaurant is 'halal' certified. And this in turn is because the restaurant defines itself as being 'non-halal'. If a restaurant describes itself as being non-halal, it cannot at the same time be said to be seeking to mislead customers into thinking that it is 'halal' certified simply because it invites customers to break fast during the month of Ramadhan.

[55] Put another way, can it be said that the restaurant used the expressions in the banner to mislead Muslims into believing that it was a 'halal' certified restaurant when it simultaneously expressly declared that it was in fact 'non-halal'?

Powers Of Seizure And Search Under The Trade Descriptions Act 2011

[56] Section 40 of the Trade Descriptions Act 2011 confers powers to enter premises and inspect and seize goods and documents. The section provides as follows:

> 40(1) Any Assistant Controller may, at all reasonable hours exercise the following powers:
>
> (a) he may, for the purpose of ascertaining whether any offence under this Act has been committed, inspect any goods and enter any premises other than premises used only for dwelling;

A (b) if he has reasonable cause to believe that an offence under this Act has been committed, he may seize and detain any goods for the purpose of ascertaining, by testing or otherwise, whether the offence has been committed;

(c) he may seize and detain any goods or documents which he has
B reason to believe may be required as evidence in proceedings for an offence under this Act;

(d) he may, for the purpose of exercising his powers under this subsection to seize goods, but only if and to the extent that it is reasonably necessary in order to secure that the provisions of this Act and of any order made under this Act are duly observed, require
C any person having authority to do so to break open any container or open any vending machine and, if that person does not comply with the requirement, he may do so himself ...

[57] The statute therefore regulates entry and seizure by the enforcing
D authority.

[58] It is apparent from a perusal and application of the foregoing provisions that the entry and seizure by the respondents in the case of the Tandoor Grill did not fall within any of the specified categories set out above.

E **[59]** Section 40(1)(a) envisages an inspection where it is suspected that an offence under the Act had been committed. However, where a restaurant classifies itself as being 'non-halal' publicly to the world at large, and the respondents are aware of the same, can it reasonably be said that an offence of misleadingly representing itself as being 'halal' has been committed?

F **[60]** If a restaurant is expressly stated to be non-halal, it cannot then simultaneously be accused of exhibiting insignia indicating falsely that it is 'halal'. This is because the fact that it describes itself as non-halal, negates any possibility of misleading persons into thinking that it is 'halal'.

G **[61]** Sub-sections (b), (c) and (d) specify the ancillary powers of seizure and detention that the respondents are granted under the Act. These ancillary powers too are strictly defined to be confined to circumstances where there is a possibility of an offence under the Trade Descriptions Act 2011 and its subsidiary 'halal' regulations being contravened.

H **Are The Trade Descriptions Act And The Subsidiary Legislation Relating To 'Halal' Applicable On The Facts Of This Case?**

[62] From the foregoing examination of the legislation it is evident that the Trade Descriptions Act and the Trade Descriptions (Definition of Halal) Order 2011, is primarily anchored towards punishing offenders who have
I misleadingly labeled or held out their food or services as being certified as

'halal', when in fact such food and services are not. It was not enacted to punish purveyors of food and drink who expressly certify themselves as being 'non-halal'. It has simply no application to providers of services expressly stated to be non-halal. And this is because if goods or services are expressly stated to be non-halal, then they cannot at the same time cause confusion amongst Muslims on the grounds that they are labeled or held out as being 'halal'.

[63] As stated at the outset, in the case of the 'Tandoor Grill' a search online by the general public will show that the restaurant is non-halal. The restaurant does not display any logos or other insignia seeking to establish that it is 'halal' certified. As such, the foregoing legislation, *albeit* the Trade Descriptions Act and the Trade Descriptions (Definition of Halal) Order 2011 has no direct application on the facts of this case. It bears repeating that the Tandoor Grill by expressly holding itself out as being non-halal, does not fall within the ambit of persons or entities sought to be prosecuted under the said Act and subsidiary legislation.

[64] The respondents however maintain that the fact that the Tandoor Grill displayed banner and brochures (which had received the approval of the Dewan Bandaraya Ipoh) to invite the general public including Muslims to break fast at the restaurant during the month of Ramadhan, amounts to an offence under O. 4(1) of the Trade Descriptions (Definition of Halal) Order 2011. Accordingly, the respondents maintain that they are entitled to exercise powers of inspection and seizure under s. 40 of the primary Act. However the flaw in this line of reasoning is, as stated above, simply this: How can the restaurant be said to offer to supply food through a representation or act which is likely to mislead or confuse a person that the food supplied is 'halal', when the restaurant explicitly states that its food is in fact 'non-halal'? In this context therefore, a Muslim who chooses to eat at the restaurant does so voluntarily, knowing that the restaurant is 'non-halal'. It is pertinent in this context that 'halal' certification in Malaysia is voluntary.

[65] Ultimately in the regulation of halal affairs in Malaysia, the object of the Trade Descriptions Act and its subsidiary legislation is to punish and extinguish any 'non-halal' food or products which are claimed to be 'halal'. Only then will such items be said to contravene the provisions of the Trade Descriptions Act. It is not to be utilised to punish purveyors of food who expressly stipulate that their food or services are non-halal, because there is then no false or misleading label describing the food or the services.

[66] In other words, the Act and regulation were not enacted to punish persons who supply and serve non-halal products and services *per se*. It is necessary for a non-halal supplier of food and services to misleadingly represent that he is supplying 'halal' certified food or services, when in fact

A he is not, in order to contravene the provisions of the Act and the subsidiary legislation relating to 'halal' certification. The Tandoor Grill as an expressly certified 'non-halal' restaurant cannot therefore be said to be contravening the Act by misleading consumers as to the status of the food it serves.

B **[67]** Given the purpose of the Act and the acts of the respondents, can it be said, as found by the High Court, that the respondents had the requisite authority or mandate to enter and seize articles from a restaurant that expressly claimed to be non-halal?. In my view, contrary to the express finding of the learned High Court Judge, the respondents were not, in the circumstances of the instant case, empowered to enter onto the premises of C the Tandoor Grill and to undertake a search and seizure exercise under s. 40 because there was no basis for any conclusion on their part that an offence had been committed under the Trade Descriptions Act 2011 or its 'halal' subsidiary legislation. The use of a banner and brochures inviting the public including Muslims to break fast could not be misleading or likely to confuse D customers, in the face of the restaurant's express representation that it is 'non-halal'. It therefore became a matter of choice for Muslims to dine or to decline to dine at the outlet.

Agreed Fact That Appellant's Employee Had Agreed To Permit Entry To The Restaurant On 23 July 2013

E **[68]** I am aware that parties had in fact agreed at the outset that the respondents were authorised to enter and search the premises. This would generally mean that the court is precluded from examining or adjudicating upon an agreed fact. However the respondents' right to enter and search the premises under the provisions of the Trade Descriptions Act 2011 is not a F matter of fact, but one of law. Where parties have agreed upon a matter, which to my mind is fundamentally flawed in law, then it is open to the court to correct or rectify this error of law. The error of law here is that the respondents were fully authorised to exercise powers under s. 40 of the Act, when in point of fact they were not.

G **[69]** In these circumstances, as the respondents' entry and seizure was not authorised under s. 40 of the Act, it would follow that their action in entering and seizing products from the premises of the Tandoor Grill on 24 July 2013 amounted to trespass.

H **[70]** I am fortified in my conclusion by the evidence of the respondents (see evidence of SD5 and SD3) as to the purpose of carrying out the operation at the restaurant. Their testimony was that the purpose for the operation was to enforce and to examine whether the restaurant had a 'halal' certificate.

[71] However, SD5 testified that prior to the conduct of the search and I seizure operation on 24 July 2013, the respondents were already aware of the status of the restaurant as being 'non-halal'. This in turn is because after

his department received a letter of complaint on 19 July 2013, they had checked on the status of the restaurant online and ascertained that it was 'non-halal'. SD3's evidence on the subject was similar.

[72] If the respondents were fully aware that the restaurant held itself out as being non-halal, then how could it be said that the purpose of carrying out the operation was to ascertain this fact, namely whether the restaurant had a halal certificate? This again points to the fact that the 'raid' or search was undertaken for a collateral or ulterior purpose.

[73] It is evident from a perusal of the respondents' evidence holistically that the reason for the conduct of the operation was the use by the appellant of a banner and brochures using phrases or expressions inviting the public to break fast at the restaurant. This, the respondents felt, amounted to conduct misleading or confusing to Muslims. However, the basis for such a conclusion is essentially flawed given the express declaration by the restaurant that it is 'non-halal'. A non-halal restaurant is hardly likely to deceive or confuse simply because it invites the breaking of fast in its restaurant in the month of Ramadhan. In this context it is significant that there were no 'halal' logos or any such sign on either the brochures or the banner. In short, there was simply no misleading information or insignia in the restaurant's advertisement that could reasonably be construed as amounting to a statement that the restaurant was 'halal' certified. In the absence of such an essential element of the offence, I can only conclude that the entry and seizure was unauthorised and therefore unlawful. To that extent the entry and seizure in law, to my mind, amounted to trespass.

Was The Manner Of The Conduct Of The Operation Such As To Warrant A Finding Of *Mala Fides* On The Part Of The Respondents?

[74] Given the entirety of the circumstances leading to the search and seizure operation and its conduct on 24 July 2013, I am of the view that the respondents acted in a *mala fide* manner in conducting their illegal operation for, *inter alia*, the following reasons:

(i) purporting to exercise their circumscribed powers under s. 40 of the TDA 2011 to ascertain whether the Tandoor Grill was a 'halal' or non-halal restaurant when they knew from the express declaration of the restaurant that it listed itself as 'non-halal'. The power granted to the respondents under the Act envisages that such powers of search and seizure are utilised against outlets and providers who misleadingly represent themselves as being certified 'halal', and not against outlets and providers who expressly declare themselves to be non-halal;

(ii) acting on an anonymous complaint that could never be verified;

(iii) continuing to act on the complaint which was premised on the basis that the Tandoor Grill was certified 'halal', despite ascertaining that it was not so certified and had expressly declared so. As such, the issue of confusing customers into believing that it was of 'halal' status could not reasonably arise;

(iv) the calling of the press to ensure that the entire proceedings would be televised nationwide. There was no requirement that these purportedly investigative proceedings be televised. Notwithstanding this, the respondents insisted on the press being present and recording the entire proceedings, which was calculated to cause discomfort and damage to the appellant;

(v) the failure to comply with routine hygienic requirements when undertaking the inspection resulted in unnecessary loss and damage to the appellant that then had to dispose of the products under health and safety laws and regulations. The appellant has not been compensated for the loss so suffered; and

(vi) the timing of the inspection exercise at a peak hour is yet another indication that the search was undertaken to cause maximum embarrassment, inconvenience and damage to the appellant. With an intrusion comprising no less than 30 - 35 persons, the impression given to the restaurant's customers would inevitably be some serious wrongdoing, when in point of fact there was no legal basis for the entire operation.

[75] In these circumstances I am constrained to conclude that the exercise of the powers by the respondents was not founded in law and was not exercised with the proper decorum and restraint expected of them. It brings to mind the oft repeated words of Sultan Azlan Shah, who as a Federal Court Judge famously said in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135:

> Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise there is dictatorship.

[76] The respondents here, to my mind, failed to act within the legal limits prescribed to them under the Trade Descriptions Act 2011 and its subsidiary legislation relating to 'halal' certification and enforcement. Having breached the powers accorded to them, or having acted without proper legal basis in undertaking the search operation on 24 July 2013, I am constrained to conclude that their cumulative acts amounted to trespass, for which the appellant is entitled to be compensated in damages. The appeal is therefore allowed with costs.

[77] The matter which has only been heard and adjudicated upon in relation to liability is therefore remitted to the High Court for the hearing of the assessment of damages.

Zamani A Rahim JCA (Majority):

Introduction

[78] This is an appeal against the decision of the learned Judicial Commissioner of the High Court at Ipoh in Civil Suit No. 22NCVC-147-09-2013 on the appellant (plaintiff)'s claim against the respondents (defendants) for trespass. The trial was confined to the issue of liability only. On 24 November 2014 the learned Judicial Commissioner had dismissed the appellant's civil suit and found in favour for the respondents and ruled that there was no trespass, and the inspection of the appellant's restaurant does not amount to *mala fide* and thereby the respondents' presence on the restaurant do not amount to trespass.

[79] We heard the appeal on 22 June 2015 and reserved our decision to consider the submissions of learned counsel for the appellant and the Senior Federal Counsel for the respondents. We have since considered their respective submissions and now deliver our decision together with our written grounds. My learned brother Justice Abang Iskandar bin Abang Hashim has had the occasion to read the draft of my judgment and has expressed his view that he is in agreement with me. My learned sister Justice Nallini Pathmanathan has also read my draft judgment and has indicated that she has a different view of the matter and as such she delivers a dissenting decision. This judgment is therefore the majority decision of this court.

Brief Backgrounds Facts

[80] The brief facts are as follows. On 24 July 2013, at about 11.30am, the first respondent to the ninth respondent entered Tandoor Grill Restaurant (the restaurant) to carry out an inspection. The inspection was conducted by three government agencies including the tenth respondent, the 11th respondent, the 13th respondent and Jabatan Agama Islam, Perak (JAIPk).

[81] During the inspection, it was found that the restaurant displayed a banner written with the words or phrases as follows:

SELAMAT BERBUKA PUASA!

BUFFET RAMADHAN 2013

NIKMATI JUADAH BERBUKA PUASA BERSAMA TANDOOR GRILL SEPANJANG RAMADHAN INI

[82] Beside the banner, there were also brochures which were placed at the counter bearing the words:

SELAMAT BERBUKA PUASA

RAMADHAN BUFFET

[83] Both the banner and brochures had been seized by KPDNKK.

[84] The restaurant is not recognised as a halal restaurant. It has no halal certificate. The owner of the restaurant was investigated and subsequently prosecuted for an offence under the Trade Descriptions Act 2011. The criminal prosecution is said to be pending.

The Appeal

[85] The appellant in the memorandum of appeal dated 19 January 2015 had listed nine grounds of appeal. The grounds may be summarised into two issues as follows:

(i) whether the respondents had trespassed on the appellant's restaurant; and

(ii) whether the inspection was carried out *mala fide* which amount their entry or presence in the restaurant as trespass.

Whether The Inspection On The Restaurant Amounts To Trespass

[86] The starting point is, what is trespass in law? The definition of trespass may be gleaned in *Oakfield Enterprises Sdn Bhd v. Tenaga Nasional Bhd* [1998] 1 LNS 430; [1998] MLJU 70:

> … what is trespass of land? *Clerk & Lindsell on Torts* (Seventeenth Edition) at page 837 defines trespass of land as follows -
>
> > Trespass to land consists in any unjustifiable intrusion by one person upon land in the possession of another.

[87] From the above definition, there was no unjustifiable intrusion of the appellant's restaurant by the first respondent to the ninth respondent as the latter entered the restaurant under the legal power conferred by the statute, namely, the Trade Descriptions Act 2011.

> Trade Description Act 2011
>
> 40 Power to enter premises and inspect and seize goods and documents
>
> (1) Any Assistant Controller may, at all reasonable hours exercise the following powers:
>
> (a) he may, for the purpose of ascertaining whether any offence under this Act has been committed, inspect any goods and enter any premises other than premises used only for dwelling;
>
> (b) if he has reasonable cause to believe that an offence under this Act has been committed, he may seize and detain any goods for the purpose of ascertaining, by testing or otherwise, whether the offence has been committed;
>
> (c) he may seize and detain any goods or documents which he has reason to believe may be required as evidence in proceedings for an offence under this Act;

(d) he may, for the purpose of exercising his powers under this subsection to seize goods, but only if and to the extent that it is reasonably necessary in order to secure that the provisions of this Act and of any order made under this Act are duly observed, require any person having authority to do so to break open any container or open any vending machine and, if that person does not comply with the requirement, he may do so himself.

(2) An Assistant Controller seizing any goods or documents in the exercise of his powers under this section shall inform the person from whom they are seized and, in the case of goods seized from a vending machine, the person whose name and address are stated on the machine as being the proprietor or, if no name and address are so stated, the occupier of the premises on which the machine stands or to which it is affixed.

(3) Where the goods or documents seized by the Assistant Controller in the exercise of his powers under this section are by reason of their nature, size or amount not practical to be removed from where they are found, he may be any means seal such goods or documents in the premises or container in which they are found and it shall be an offence for any person without lawful authority to break, tamper with or damage such seal or to remove such goods or documents or to attempt to do so.

42 Power of entry and search and seizure without a warrant

If the Assistant Controller is satisfied upon information received that he has reasonable cause to believe that by reason of delay in obtaining a search warrant under section 41 the investigation would be adversely affected or evidence of the commission of an infringement or offence is likely to be tampered with, removed, damages or destroyed, the Assistant Controller may enter the premises and exercise in, upon and in respect of the premises all the powers referred to in section 41 in as full and ample a manner as if he were authorised to do so by a warrant issued under that section.

[88] On the legal power of the respondents to enter the restaurant, if the respondents abuse their authority, this will give rise to "trespass *ab initio*" as restated in *Azizah Zainal Abidin & Ors v. Dato Bandar Kuala Lumpur* [1999] 5 CLJ 565; [1999] 2 AMR 1779 where a text from *Winfield & Jalowicz on Tort*, 13 edn at p. 369 which reads:

When an entry upon land or other *prima facie* trespass is justified by authority of the law itself, then, according to an ancient doctrine of the common law, if the actor abuses his authority he becomes a trespasser *ab initio*; his act is reckoned as unlawful from the very beginning, however innocent his conduct may have been up to the moment of the abuse. The doctrine applies only if the authority is that of the law, not that of other party concerned, and the abuse must be by positive act, not a mere omission.

[89] So long as the inspection of the restaurant is based on valid grounds or on the exercise of a function under the Trade Descriptions Act 2011, such process of inspection by the enforcement officers cannot be reviewed or challenged by the appellant. In the case of *Ahmad Azam bin Mohamad Salleh & Ors v. Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86. In his judgment, Raus Sharif J (as he then was) said:

> To me, the four officers from the department of the first respondent when conducting the inspection on the third respondent, on the direction of the second respondent, were merely exercising a function under the Act. To hold such process of inspection reviewable, would open up the investigation process of all enforcement agencies to constant judicial review. I have no valid reason to open the floodgate.

[90] The learned Judicial Commissioner had the opportunity to view the footages of the CCTV recordings and His Lordship found that SP1 did not show any act to restrain or protest the respondents from conducting the inspection of the restaurant.

[91] In short, the respondents had carried out the inspection in accordance with the law and therefore it cannot be accused of committing trespass. An authority to support this proposition is the case of *Oakfield Enterprise Sdn Bhd v. Tenaga Nasional Bhd*'s case, (*supra*):

> I have earlier found that the LLN have entered the said land in 1974 by authority of the law. Justification of its entry was afforded by operation of law and hence its entry upon the said land is not trespass if it be justifiable. It is trespass to place anything on or in land in the possession of another but in the instant case, since the erection of the pylons on the said land was by authority of the law, there cannot be trespass. The LLN have entered upon the said land under an authority given by law and there is nothing to show that the LLN or TNB subsequently abused that authority. There is nothing to show that the LLN used their statutory powers as a charter to commit a tort. Since the original entry was not tortious, entry having been obtained under an authority given by law, and the appellant has not suggested any misconduct or abuse of authority on the part of the LLN or even TNB up to now, there cannot be trespass and that being so, no question of damages arise.

[92] The appellant submitted that, even if it can be accepted that the respondents had initially entered the restaurant lawfully to inspect the status of the restaurant, due to their collateral or ulterior motive of seizing the brochures and the banner on the pretext that the phrases/words or expressions written on them could mislead or confuse Muslims (without calling any expert witness to give evidence to establish the Muslims were indeed misled or confused) would render their entry a trespass *ab initio*.

[93] In arriving at his findings that the respondents had not committed any trespass on the appellant's restaurant at pp. 453-454 para. 21 of the additional record of appeal, learned Judicial Commissioner had assessed the evidence of the respondents and upon viewing the footages of the CCTV, His Lordship concluded as follows:

> Berdasarkan keterangan pihak defendan, adalah jelas tujuan operasi adalah bagi menjalankan pemeriksaan di premis TG setelah JAIPk mendapat aduan. 3 agensi Kerajaan bergabung menjalankan pemeriksaan. Sekiranya benar SP1 melarang defendan-defendan dari memasuki premis TG sekalipun, undang-undang, iaitu s. 40 Akta Perihal Dagangan 2011 memberi kuasa kepada Penolong Pegawai Penguatkuasa KPDNKKP untuk masuk membuat pemeriksaan. Namun begitu, dakwaan saksi pihak defendan yang mengatakan SP1 telah memberi kebenaran masuk ada kebenarannya. Hasil penelitian ke atas rakaman CCTV yang dikemukakan jelas menunjukkan keadaan tersebut. SP1 tidak menunjukkan apa-apa gaya atau perbuatan seperti orang yang menghalang defendan-defendan dari menjalankan pemeriksaan. Tingkah laku SP1 yang turut mengiringi pasukan pemeriksa masuk ke dalam premis TG menyokong keterangan SD3 dan SD5 yang mengatakan telah mendapat kebenaran untuk masuk menjalankan pemeriksaan. Oleh itu persoalan sama ada defendan pertama hingga kesembilan telah melakukan pencerobohan apabila masuk membuat pemeriksaan hendaklah dijawab secara negatif.

[94] The learned Judicial Commissioner had not committed a misdirection of law and facts and His Lordship had rightly directed his mind in arriving at the findings based on the evidence presented before him. We find that he had not committed any misdirection on the law or on the facts.

Whether The Inspection On The Restaurant Was Conducted With Mala Fide

[95] Now, we move to the issue of whether the inspection by the respondents was carried out *mala fide* which render their presence in the restaurant as trespass.

[96] The law imposed the onus to prove *mala fide* is on the appellant. In order to succeed, the appellant had to show an improper and bad motive. A mere suspicion would not suffice. It is by no means an easy burden to discharge.

[97] Professor MP Jain in *Administrative Law of Malaysia and Singapore* at p. 413 wrote as follows:

> … The Malaysian courts take a much stricter view even on the onus of proving *mala fide*. The Privy Council ruled in *Yeap Seok Pen v. Government of the State of Kelantan*:
>
> > He who asserts bad faith has the burden of proving it, mere suspicion is not enough …

[98] In *Basu's Commentary on the Constitution of India*, 5th edn, vol. 2 at p. 153, the commentary says *albeit* in the context of unlawful preventive detention as follows:

> The question of *mala fide* has to decided with reference to the facts of each case and the observations in one case cannot be regarded as a precedent in dealing with other cases.
>
> The onus of proving *mala fide* is upon the detenu (in this case the appellant) and the trend of recent decisions shows that it is not likely that the detenu may succeed in many cases.

And the above commentary was cited and referred to in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129 at p. 130 (a case of an application for a writ of *habeas corpus*).

[99] In the case of *Anne Lim Keng See v. The New Straits Times Press (M) & Anor and Other Appeals* [2008] 6 CLJ 697; [2008] 3 MLJ 492, in the law of tort *mala fide* or malice can only be based upon the specific cause of action. Besides that, *Anne Lim Keng See*'s case, *supra* also defines what is malice or *mala fide*. The Court of Appeal held that (at p. 722 (CLJ); p. 517 (MLJ)):

> What is malice? According to *Osborn's Concise Law Dictionary* (7th edn) the word "malice" means:
>
> > Ill-will or evil motive: personal spite or ill-will sometimes called actual malice, express malice or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (*Horrocks v. Lowe* [1972] 1 WLR 1625). Malice in the law of tort is a constituent of malicious prosecution, defamation, malicious falsehood, and conspiracy. But an act otherwise legal is not made wrongful by an improper motive (*Mayor of Bradford v. Pickles* [1895] AC 587).

[100] In the instant case, to prove *mala fide* the appellant has questioned the issues of the necessity to carry out inspection during the peak lunch hour and the presence of the large number of media personnel during the inspection. We are in agreement with the respondents that these two factors alone are insufficient to constitute *mala fide*.

[101] In reply, the respondents argued that they are required to go to the restaurant in order to investigate the complaint relating to the halal issue and the confusion caused to the public. Although the appellant had argued that the respondents knew of the halal/non halal status of the restaurant, there is still a necessity to confirm it by the best evidence of physical inspection of the restaurant before any action could be taken.

[102] The learned Judicial Commissioner had correctly considered and addressed his mind to this issue. The relevant passage in His Lordship's judgment at p. 455 para. 22 of the additional record of appeal reads as follows:

> Bagi menentukan sama ada sesebuah premis yang tidak ada sijil halal itu mempamerkan dirinya sebagai sebuah restoran halal atau tidak, sudah pastinya pemeriksaan secara fizikal perlu diadakan. Semakan atas talian hanya boleh menunjukkan status sesebuah premis makanan itu sahaja dan bukannya boleh menentukan soal pematuhan.

[103] Therefore clearly based on the facts and evidence, the respondents have good reasons to carry out physical inspection. In *Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor* [2010] 9 CLJ 46; [2010] MLJU 652, the High Court had dismissed the claimant's claim who was challenging the forfeiture process done by the KPDNHEP. Mohamad Ariff bin Md Yusof J (as he was then) decided that there must be a good reason for the enforcement agency to carry out the inspection.

[104] The respondents' witnesses had testified before the court relating to the inspection that was conducted on the restaurant. According to their testimonies, the reason that the inspection was carried out as it was triggered by the suspicion that the owner of the restaurant had committed an offence pertaining to halal matters. It all began when there was a complaint letter that was received on 16 July 2013 by Jabatan Agama Islam Perak (JAIPk). The complainant sought for clarification on the halal status of the restaurant. Further, the contents of the letter revealed that the complainant had visited the said restaurant and found out that the restaurant had offered to serve Ramadhan buffet. The complainant was suspicious as he noticed that the said restaurant served alcohols and this was clearly in violation with the halal status or issues (please refer to "Surat Aduan" dated 16 July 2013 p. 330 record of appeal). The author of the 'Surat Aduan', though unidentified, obviously he or she was a Muslim. The Muslims are very particular about the food they consume in that the food must be halal as required by the Holy Quran. It does not help that the offer, as evidenced in the banner and brochures, was made in the Holy month of Ramadhan.

[105] Now let us revert back to the main stream of this case. Upon inspection, the respondents found there were the banner and brochures (see at pp. 308, 309 and 310 of the record of appeal) with these phrases or expressions:

> SELAMAT BERBUKA PUASA!
>
> BUFFET RAMADHAN 2013
>
> NIKMATI JUADAH BERBUKA PUASA BERSAMA TANDOOR GRILL SEPANJANG RAMADAN INI

A And

SELAMAT BERBUKA PUASA

RAMADHAN BUFFET

[106] The banner and brochures went a long way to support the B complainant's suspicion. The respondents' witnesses had also given the evidence that the contents of the banner and brochures amounted to an offence under the Trade Descriptions Act 2011. SD3 explained in detail of the offence that was committed by the appellant in his examination in chief as follows:

C Counsel : Adakah ia menjadi satu kesalahan untuk menggunakan ungkapan "Selamat Berbuka Puasa", "Buffet Ramadhan" tanpa memiliki sijil halal?

SD3 : Ya. Menurut Per. 4(1) Perintah Perihal Dagangan (Perakuan dan Penandaan Halal 2011) Pindaan P.U.A 53) adalah semua D makanan dan barang-barang tidak boleh diperihalkan sebagai halal atau diperihalkan dengan ungkapan lain untuk menunjukkan makanan atau barang-barang itu boleh dimakan atau digunakan oleh orang Islam melainkan diperaku oleh pihak berkuasa berwibawa. Selain itu, menurut Per. 4(1) Perintah Perihal Dagangan (Takrif Halal) 2011 adalah mana- E mana orang yang membekalkan atau menawarkan untuk membekalkan apa-apa makanan dengan membuat representasi atau perbuatan yang boleh memperdayakan atau mengelirukan mana-mana orang bahawa makanan itu adalah halal atau boleh dimakan oleh orang Islam.

F **[107]** Thus, the words that were reflected on the banner and brochures must relate to halal cuisine or delicacies. That has to be so because by making such offer during the month of Ramadhan the intended customers or patrons would be Muslims. By so offering, the appellant was, by way of necessary implication, representing that the restaurant was offering halal food, when in G fact it was a certified non-halal outlet. Based on those words, it may likely cause confusion, deception or mislead the Muslim customers. Therefore, there is a statutory duty on the part of the respondents to conduct further investigation as provided under Trade Descriptions Act 2011.

[108] Subsequently, the appellant was charged under O. 4(1) Trade H Descriptions (Definition of Halal) Order 2011 and punishable under O. 5(b) of the same Act.

Trade Descriptions (Definition of Halal) Order 2011

4 Offence to mislead or confuse

I (1) Any person who supplies or offers to supply any food through any representation or act which is likely to mislead or confuse any person that the food is halal or can be consumed by a Muslim commits an offence.

(2) For the purpose of subparagraph (1), representation or conduct includes the usage of the holy verse of Al-Quran or any matter or object in relation to the religion of Islam either in the premises in which such food is sold or in the container in which such food is supplied.

(3) Where any person is charged with an offence under subparagraph (1), the onus of proving that the food supplied or offered to be supplied is halal in accordance with the requirement in paragraph 3 shall be upon the person charged.

[109] The appellant's witnesses agreed on the suggestion that the banner and brochures have been conspicuously exhibited or displayed is to attract Muslim customers. SP1 and SP3 were cross-examined on this issue as follows:

Counsel : Do you agree with me that this brochure is created to attract the Muslim to dine at your restaurant? Do you agree or not, it is one of the reasons that your restaurant created this brochure in order to attract the Muslim to dine in your restaurant during the puasa month? One of the reason, agree or disagree, yes or no?

SP1 : Can you repeat again?

Counsel : Okay, one of the reason Tandoori Grill has came out with this brochure is to attract the Muslim to dine at your restaurant during the puasa month.

SP1 : It is one of the reason.

[110] In the cross-examination of SP3, the reply was positive as follows:

Counsel : I put it to you one of the purpose you printing this banner was to attract Muslim customers to your restaurant. Do you agree? One of your purpose. You placing this banner is to attract Muslim customers to your restaurant.

SP3 : Yes.

[111] Therefore, the appellant's act in displaying the banner and brochures so worded, is an act that would likely confuse and mislead the Muslim customers.

[112] The learned Judicial Commissioner in his grounds of judgment at p. 24 of the additional record of appeal had correctly decided as follows:

…Walau apa pun tafsiran yang diberikan pihak plaintif, adalah didapati bahawa banner dan risalah yang disita tersebut adalah merupakan iklan yang mempelawa orang beragama Islam datang makan di TG. Oleh itu pemeriksaan yang dijalankan defendan pertama hingga kesembilan adalah wajar dan dibenarkan oleh undang-undang.

[113] Moving on to the second point where the appellant argued the inspection was carried out with *mala fide* on the ground that the media/press people in large number were invited during the peak lunch hour to the restaurant. We agree with the respondents that these grounds are not enough and unsustainable to constitute *mala fide*. Furthermore the first respondent to ninth respondent were not the persons who contacted and invited the media/press to the restaurant. It was JAIPk who had contacted the media and unfortunately JAIPk was not named as one of the tortfeasors in this action. Hence, the appellant's claim that the presence of the large number of the media personnel during the inspection at the restaurant was a deliberate intention. According to the appellant the true intent of the said raid or inspection with the presence of the media was to capture the whole operation on film which was subsequently aired on the national news, the operation was therefore carried out by the respondents with *mala fide*: The cases of *Karam Singh*, *supra* and *One Visa Sdn Bhd v. Telekom Malaysia Bhd* [2015] 10 CLJ 569; [2014] 4 AMR 159 were cited. Finally, the off-quoted passage of Raja Azlan Shah Ag CJ was quoted in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2011] 1 CLJ 592 was quoted as follows:

> Every legal power must have legal limits, otherwise there's dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these day when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.

[114] Based on the evidence of an officer from JAIPk, SD5 who admitted that he informed the media about the impending raid to be carried out on the said restaurant. Unfortunately, the numbers of the media personnel who attended were unexpected – beyond his control. SD5 also explained that he contacted the media was for the purpose that the information be conveyed to the Muslim public for them to be cautious of the Ramadhan buffet offer as its halal status was questionable. The respondents or JAIPk did not intend to humiliate the appellant or to abuse their powers.

[115] This issue has been rightly addressed by the learned Judicial Commissioner where at p. 458 para. 25 of the additional record of appeal where His Lordship held that:

> Walau pun tindakan JAIPk menjemput pihak media bukanlah satu tindakan yang wajar, adalah didapati bahawa niat jemputan tersebut bukanlah untuk memalukan plaintif tetapi hanya satu tindakan bagi

mengingatkan orang beragama Islam supaya lebih berwaspada. Oleh itu tindakan tersebut bukannya terjumlah kepada perbuatan *mala fide* yang menyebabkan pemeriksaan yang dijalankan boleh dianggap satu pencerobohan.

[116] Thus, the appellant has failed to prove that the respondents acted *mala fide* when they carried out the inspection on the appellant's restaurant.

Conclusion

[117] Based on the above grounds, the learned Judicial Commissioner has not erred in law and facts and accordingly, we affirmed His Lordship's decision. The appellant's appeal is, therefore, dismiss with cost of RM15,000 payable by the appellant to the respondents. The deposit is to be refunded to the appellant.